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UNITED STATES SURGICAL A DIVISION OF
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DEC 17 2003

OFFICE OF PETITIONS

In re Application of
Guanghui Zhang
Application No. 09/580,884
Filed: May 30, 2000
Attorney Docket No. 2373

ON PETITION

This is a decision on the petition to revive under 37 CFR 1.137(a), filed December 2, 2003.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." As the petition fee has already been paid, there is no further fee for a renewed petition.

The above-identified application became abandoned for failure to timely file a reply to the Notice of Non-Compliant Amendment, mailed May 14, 2001, which set an extendable period for reply of one month. This notice indicated that an amendment filed on May 7, 2001 was non-compliant because it was not submitted in the format required by 37 CFR 1.121 (the amendment did not include a marked up version of the amended claims). No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, no reply to the Notice of Non-Compliant Amendment having been received, the above-identified application became abandoned on June 15, 2001. A Notice of Abandonment was mailed on January 29, 2003.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

Petitioner contends that he never received the Notice of Non-Compliant Amendment. Petitioner has not met the showing required to establish nonreceipt of an Office action. In addition to stating that an Office action was not received, a practitioner must attest to the fact that a search of the file jacket and docket records indicates nonreceipt. Furthermore, a practitioner must include a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed.³ For example, where an Office action sets a period for reply of one month, "a copy of the docket report showing all replies docketed for a date [one month] from the mail date of the nonreceived [Office action] must be submitted as documentary proof of nonreceipt of the [Office action]."⁴ Here, petitioner has not submitted a copy of a docket record.

Furthermore, petitioner has not accounted for the ten month delay in filing the petition. As the Notice of Abandonment was mailed on January 29, 2003, and the instant petition was not filed until

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c)(II).

⁴ Id (emphasis added).

December 2, 2003, petitioner must show that this period of delay was unavoidable.

If petitioner can not meet the showing required to establish non receipt of the Notice of Non-Compliant Amendment, and can not show unavoidable delay in filing the petition, petitioner may file a petition to revive pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

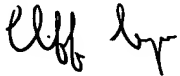
A copy of the Notice of Non-Compliant Amendment mailed on May 14, 2001 is enclosed for petitioner's convenience.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries should be directed to the undersigned at (703) 305-0272.



Cliff Congo
Petitions Attorney
Office of Petitions

Enc: Office action mailed May 14, 2001 (1 page)